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No. 80-757

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI,
Petitioners,

vs.

NEIL LEIST, PHILIP SMITH AND INCOMCO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF NINE UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*, and BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December 19, 1980

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MOTION OF NINE UNITED STATES COMMODITY EXCHANGES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The EXCHANGES[1] respectfully move, pursuant to Rule 36 of this Court, for leave to file the accompanying brief *amici curiae* in support of the petition of the New York Mercantile Exchange for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

[1] Board of Trade of the City of Chicago; Board of Trade of Kansas City, Mo., Inc.; Chicago Mercantile Exchange; Citrus Associates of the New York Cotton Exchange, Inc.; Coffee, Sugar & Cocoa Exchange, Inc.; Commodity Exchange, Inc.; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; and New York Cotton Exchange.

The New York Mercantile Exchange consented to the EXCHANGES' appearance as *amici curiae*, but the respondents have refused such consent.

The question presented by the petition is whether the Second Circuit erred when it held in a two-to-one decision that a private cause of action for damages may be implied against a commodity exchange and its officials for alleged violations of the Commodity Exchange Act (7 U.S.C. §§ 1-25).

The EXCHANGES, like the Petitioner New York Mercantile Exchange, are federally-designated commodity exchanges on which futures contracts may be lawfully traded in the United States. Nearly 75 million futures contracts were traded through their facilities in 1979 alone. By virtue of the size, scope, and importance of the EXCHANGES' markets, and the accompanying duty to police those markets, their exposure in and vulnerability to private suits is enormous and the potential impact devastating.

The decision of the Second Circuit immediately and directly affects several of the EXCHANGES. For example, the Chicago Board of Trade and the Commodity Exchange, Inc., are defendants in an action pending in the United States District Court for the Southern District of New York (*Selig Strax* v. *Commodity Exchange, Inc., et al.*, No. 79 Civ. 5366) in which damages of more than one billion dollars are sought against these exchanges for alleged violations of the Commodity Exchange Act.[2]

[2] Additionally, the Citrus Associates of the New York Cotton Exchange, Inc. is a defendant in an action pending in the Southern District of New York predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Citrus Associates in the amount of 5 million dollars. *Nancy Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc., et al.*, No. 78 Civ. 178. The Commodity Exchange, Inc., is a defendant in another action

(Footnote continued on following page)

The EXCHANGES believe that the instant case involves significant issues of public policy, central to the nature and proper functioning of federally-mandated self-regulation by the EXCHANGES, which deserve this Court's analysis. Moreover, important aspects of the pertinent legislative history, critical to determining the questions raised in this case, simply were not considered by the Second Circuit.

Although most forceful and compelling, the Petition of the New York Mercantile Exchange does not address these considerations.

WHEREFORE, the EXCHANGES respectfully request this Court for leave to file their brief *amici curiae* submitted herewith.

Respectfully submitted.

PHILIP F. JOHNSON

(Footnote continued from preceding page)
pending in the Southern District of New York also predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 100 million dollars. *Republic National Monetary Corp.* v. *Commodity Exchange, Inc., et al.*, No 80 Civ. 5397. Also, the Chicago Board of Trade is a defendant in two actions pending in the Northern District of Illinois predicated on alleged violations of the Commodity Exchange Act which seek damages against the Board in excess of 5.6 million dollars. *Philip Smith* v. *Richard Groover, et al.*, No. 77 C 2297; *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.*, No. 80 C 1111. The Coffee, Sugar & Cocoa Exchange, Inc. is a defendant in a state court action in Texas predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 2 million dollars. *Schneider, Bernet & Hickman, Inc.* v. *Equitable Trust Co.*, No. 78-CI-10640, Dis.Ct., 150th Jud.Dis., Bexar County, Texas.

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QUESTION PRESENTED

Whether it was the intent of Congress that federally-designated commodity exchanges, which operate under pervasive federal regulation and are subject to severe penalties and sanctions for noncompliance with their duties under the Commodity Exchange Act, and which have been specifically exempted or excluded from every provision of the Act creating private causes of action for damages, should nevertheless be subject—by implication alone—to private damage claims under section 5(d), 5a(8), or 9(b) of the Act [7 U.S.C. § 7(d), 7a(8), or 13(b)].*

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* Related questions are presently before this Court:

(1) Whether section 4b of the Commodity Exchange Act [7 U.S.C. § 6b] provides customers with a cause of action for damages against their futures commission merchants is the subject of the pending petition in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203. In this regard, the EXCHANGES join with the New York Mercantile Exchange in suggesting that the Court consider that petition and the instant petition together.

(2) Whether section 4b or section 9(b) of the Commodity Exchange Act [7 U.S.C. §§ 6b, 13(b)] provides *non*-customers with a cause of action for damages against futures commission merchants is the subject of petitions to review the judgment below which have been filed by Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF NINE UNITED STATES COMMODITY EXCHANGES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of the EXCHANGES,[1] as *amici curiae*, in support of the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit filed on November 12, 1980 by the New York Mercantile Exchange.

[1] Board of Trade of the City of Chicago; Board of Trade of Kansas City, Mo., Inc.; Chicago Mercantile Exchange; Citrus Associates of the New York Cotton Exchange, Inc.; Coffee, Sugar & Cocoa Exchange, Inc.; Commodity Exchange, Inc.; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; and New York Cotton Exchange.

PRELIMINARY STATEMENT

Once again the Court is asked to decide "whether a private remedy is implicit in a statute not expressly providing one," *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 562 (1979)—this time under the Commodity Exchange Act.

The petitioner New York Mercantile Exchange specifically seeks review and reversal of the decision in *Leist* v. *New York Mercantile Exchange*, ____ F.2d ____, Comm. Fut.L.Rep. (CCH) ¶21,051 (2d Cir. 1980), where the Second Circuit held in a two-to-one decision that federally-designated commodity exchanges and their officials may be sued for unlimited damages for alleged violations of the Commodity Exchange Act (7 U.S.C. § §1-25).

The Second Circuit reached this far-reaching result notwithstanding the fact that the Act does not provide for any such private suit; nothing in the pertinent legislative history evidences any congressional intent whatsoever to create, by implication, private causes of action against exchanges and their officials; and, to the contrary, Congress has assiduously avoided creating such causes of action on numerous occasions, beginning with its earliest legislative actions in 1921 and as recently as the latest revision of the Act in 1978.

NATURE AND INTEREST OF THE EXCHANGES

The EXCHANGES, like the Petitioner New York Mercantile Exchange, are federally-designated commodity exchanges on which futures contracts may be lawfully traded in the United States. By law (the Commodity Exchange Act) such trading may be conducted only by and through members of these ten exchanges, as well as the recently designated New York Futures Exchange, in accordance with exchange rules and the provisions of the Commodity Exchange Act. (See 7 U.S.C. § §6, 6b, 6c, 6h).

Located in Chicago, Kansas City, Minneapolis, and New York City, the EXCHANGES provide markets for futures trading in agricultural and forest products, metals, rubber and petroleum products, foreign currencies and financial instruments. Thousands of producers and commercial users of these commodities avail themselves of the EXCHANGES' diverse markets. In 1979, nearly 75 million contracts were traded on the EXCHANGES, representing billions of dollars worth of commodities.[2]

By motion filed herewith, the EXCHANGES seek leave to appear as *amici curiae* because they believe that the resolution of the question presented for review will have a substantial impact on their own operations as self-regulatory organizations and as world markets. By virtue of the size, scope and importance of their markets, and the accompanying duty to police those markets, the EXCHANGES' exposure in and vulnerability to private damage suits is enormous, and the impact is potentially devastating.

The Second Circuit's decision immediately and directly affects several of the EXCHANGES. For example, the Chicago Board of Trade and the Commodity Exchange, Inc. are defendants in an action pending in the United States District Court for the Southern District of New York in which damages of more

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[2] "The importance of futures trading to the general public and to the Nation equals the importance of the securities markets." [Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 19 (1974)]. The nature, function and economic importance of futures trading have been described by this Court on a number of occasions. See *Board of Trade of the City of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 245, 247-49 (1905); *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 235-36 (1918); *Board of Trade of the City of Chicago* v. *Olsen*, 262 U.S. 1, 33 (1923); *United States* v. *New York Coffee & Sugar Exchange, Inc.*, 263 U.S. 611, 618-21 (1924).

than one billion dollars are sought against them for alleged violations of the Commodity Exchange Act.[3]

Central to the EXCHANGES' interest in this case is the fact that, as duly designated "contract markets" under the Commodity Exchange Act, their mandated activities are not confined simply to the conduct of a commercial business. Since the first enactment of a federal futures trading law in 1921, Congress has assigned to commodity exchanges another important role, namely, the duty to police their marketplaces and to act as a supplement and partner to the federal government in achieving the public-protection objectives of the law (now the Commodity Exchange Act). Few institutions occupy such a status in this society and, as a result, it is inappropriate to define an exchange's legal posture as that of an ordinary commercial enterprise.

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[3] *Selig Strax* v. *Commodity Exchange, Inc., et al.*, No. 79 Civ. 5366 (S.D.N.Y.). Additionally, the Citrus Associates of the New York Cotton Exchange, Inc. is a defendant in an action pending in the Southern District of New York predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Citrus Associates in the amount of 5 million dollars. *Nancy Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc., et al.*, No. 78 Civ. 178. The Commodity Exchange, Inc. is a defendant in yet another suit pending in the Southern District of New York also predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 100 million dollars. *Republic National Monetary Corp.* v. *Commodity Exchange, Inc., et al.*, No. 80 Civ. 5397. Also, the Chicago Board of Trade is a defendant in two suits pending in the Northern District of Illinois predicated on alleged violations of the Commodity Exchange Act which seek damages against the Board in excess of 5.6 million dollars. *Philip Smith* v. *Richard Groover, et al.*, No. 77 C 2297; *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., et al.*, No. 80 C 1111. The Coffee, Sugar & Cocoa Exchange, Inc. is a defendant in a state court action in Texas predicated on alleged violations of the Commodity Exchange Act which seeks damages against the Exchange in excess of 2 million dollars. *Schneider, Bernet & Hickman, Inc.* v. *Equitable Trust Co.*, No. 78-CI-10640, Dis.Ct., 150th Jud.Dis., Bexar County, Texas.

Moreover, it is important to recognize that private suits brought against commodity exchanges (including their officials) for "violating" the Commodity Exchange Act rarely allege actual misconduct by the exchanges. Rather, the commonplace allegation is simply that *others* engaged in unlawful activity that the exchanges' self-policing system failed to detect or prevent. The gravamen of these complaints, therefore, goes to the question of enforcement effectiveness and the appropriateness of regulatory responses, issues that frequently emerge as well when a federal agency fails to detect or prevent violations of the statute that it administers or makes difficult judgment calls in the face of problems it perceives.

Thus, there exists a close parallel, in law and in public policy, between the commodity exchanges and the federal agencies in regard to the propriety of awarding damages simply upon proof of enforcement deficiencies or judgmental errors. This case presents the Court with an opportunity to decide whether different legal consequences should flow for such deficiencies or errors as between the exchanges and the Commodity Futures Trading Commission ("CFTC"), both of which are charged with essentially the same duties under the Commodity Exchange Act.

SUMMARY OF ARGUMENT

The EXCHANGES emphatically agree with the New York Mercantile Exchange that a writ of certiorari should issue because the Second Circuit decided an important question of federal law which has not, *but should be*, settled by this Court; and because the decision of the Court of Appeals is utterly irreconcilable with the decisions of this Court, most particularly the recent decisions in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); and *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980).

Additionally, the EXCHANGES submit that at the heart of this case are significant issues of public policy, central to the nature and proper functioning of federally-mandated self-regulation under the scheme of the Commodity Exchange Act, which were ignored by the Court below, but which clearly argue against implying causes of action against commodity exchanges and their officials. Such causes should be implied only if there is persuasive evidence that this was Congress' intent. The evidence is patently lacking. To the contrary, there is ample evidence that Congress specifically did *not* intend to create such a cause of action.

Furthermore, important aspects of the pertinent legislative history critical to determining the questions raised in this case were not given even cursory consideration by the Court of Appeals. Fully developed, the legislative history demonstrates beyond doubt that Congress has never expressed any intention to create private causes of action against exchanges (including their officials) and that, to the contrary, it has assiduously avoided doing so on a number of occasions.

These issues and aspects should be considered by the Court *at this time*, lest it later be forced to simply "acquiesce" to lower court decisions which can reasonably be expected to proliferate as a result of the Court of Appeals' lengthy and superficially "definitive" majority opinion. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 692 n. 13 (1979).

ARGUMENT

I.

IMPORTANT ASPECTS OF THE PERTINENT LEGISLATIVE HISTORY WERE NOT CONSIDERED BY THE COURT OF APPEALS.

Despite their length and obvious scholarship, both the majority and dissenting opinions of the Court of Appeals fail altogether to consider important aspects of the pertinent legisla-

tive history which should be considered by any court in determining whether Congress intended to create, *by implication*, private causes of action under various sections of the Commodity Exchange Act.[4]

Unlike other commodity-related statutes codified in title 7 of the *U.S. Code*, the Commodity Exchange Act (7 U.S.C. §§ 1-25) does not expressly provide for any private causes of action except in two limited circumstances: (1) administrative repara-

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[4] We submit that the "central inquiry" and "dispositive question" in this case *vis-a-vis* the exchanges (including their officials) is "whether Congress intended to create, either expressly or by implication, a private cause of action" under section 5(d), 5a(8), or 9(b) of the Commodity Exchange Act [7 U.S.C. § 7(d), 7a(8), or 13(b)]. *Redington*, 442 U.S. at 575; *Transamerica Mortgage*, 444 U.S. at 24.

Where, as is the case with sections 5(d), 5a(8), and 9(b), no express private causes are created, and the statute nowhere else provides for such causes against an exchange but does expressly provide other means for judicial and administrative enforcement, the question is whether Congress intended to create any such causes *by implication*, and such intent must be demonstrated by "persuasive evidence." In this connection, the focus must be on Congress' intent *at the time each particular statutory provision in question was enacted*. *Redington*, 442 U.S. at 571, 575 n. 16, 576; *Transamerica Mortgage*, 444 U.S. at 20.

The Court of Appeals majority, however, completely failed to follow this analytical approach. Instead, it looked at the Act as a whole, and appears to hold that any violation will support a cause of action.

It should be noted also that many of the allegations against the exchange in the complaints below appear to have nothing whatsoever to do with the sections of the Act allegedly violated, or with any other section of the Act. (See NYME Petition, p. 3). For example, no provision of the Act requires an exchange to "maintain an orderly market." (The term "orderly market" simply does not appear in the Commodity Exchange Act). Neither does the Act direct an exchange to report violations of the Act, CFTC regulations, and exchange rules. Nonetheless, the Court of Appeals majority appears to hold—again without any analysis—that these bare allegations somehow state a cause of action *under the Act*.

tions and (2) state *parens patriae* suits. [Exchanges are expressly exempted in both cases (7 U.S.C. §§ 18, 13a-2)]. This is in sharp contrast, for example, with sections 209 and 499e of title 7.

Of particular significance is section 209 of title 7, the current codification of section 308 of the Packers and Stockyards Act of 1921.[5] The Packers and Stockyards Act became law during the same month of 1921 as the Future Trading Act of 1921[6] (reenacted in revised form in 1922 as the Grain Futures Act[7] following this Court's decision in *Hill* v. *Wallace*[8]) and was written by the same congressional committees as the Future Trading Act.[9] Section 5(d) of the Commodity Exchange Act [7 U.S.C. § 7(d)], under which the Second Circuit majority implied a private cause of action against the New York Mercantile Exchange, is a carryover, *substantially word for word*, from section 5(d) of the Future Trading Act.[10]

In section 308 of the Packers and Stockyards Act of 1921 (7 U.S.C. § 209), the 67th Congress (again, the same Congress which enacted the Future Trading Act and also the Grain Futures Act) expressly provided that any stockyard, market agency, or dealer who violates specified sections of that Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation"; and that such liability may be enforced either by suit *in a federal district court, or* by a reparations complaint to the Secretary of Agriculture (under section 309 of that Act, 7 U.S.C. § 210).

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[5] Act of Aug. 15, 1921, ch. 64, 42 Stat. 165.

[6] Act of Aug. 24, 1921, ch. 86, 42 Stat. 187.

[7] Act of Sept. 21, 1922, ch. 369, 42 Stat. 998. In 1936, the Grain Futures Act was recaptioned the Commodity Exchange Act. (Act of June 15, 1936, ch. 545, § 1, 49 Stat. 1491).

[8] 259 U.S. 44 (1922).

[9] See G.O. Virtue, "Legislation for the Farmers: Packers and Grain Exchanges," 37 *Quar. J. of Econ.* 687, 693 (1923).

[10] 42 Stat. 188.

Clearly Congress, *even in 1921*, knew precisely how to (and did) create private causes of action, *when it intended to do so*. See *Redington.*, 442 U.S. at 572, 575; *Transamerica Mortgage*, 444 U.S. at 20-21. Yet no provision in any way comparable to section 308 of the Packers and Stockyards Act was enacted in the Future Trading Act, or in the Grain Futures Act adopted by the same Congress one year later.

In 1974 Congress obviously borrowed from the Packers and Stockyards Act of 1921, as well as the Perishable Agricultural Commodities Act of 1930 (see 7 U.S.C. §§ 499f and 499g), in creating an administrative reparations system under the Commodity Exchange Act.[11] Exchanges are *exempted* from this reparations system, however (7 U.S.C. § 18).

Moreover, in creating this reparations system, Congress did *not* borrow from section 308 of the Packers and Stockyards Act of 1921 (7 U.S.C. § 209), or the virtually identical provision in the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. § 499e). Thus, no provision in any way comparable to these sections—*authorizing damage suits, as well as administrative reparations*—was adopted, and the Commodity Exchange Act contains no such provision. See particularly, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) (decided some 10 months *prior to* enactment of the 1974 amendments to the Commodity Exchange Act).

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[11] *E. g., compare* 7 U.S.C. §§ 499f & 499g *with* sec. 105, H.R. 11955, 93d Cong., 1st Sess. (1973), printed at *Hearings Before the House Agriculture Comm. on H.R. 11955*, 93d Cong., 2d Sess. 341-47 (1974). See also *Hearings Before the House Agriculture Comm. on H.R. 11955* at 253 n.1 (testimony of C.W. Chapin); *Hearings Before the Senate Comm. on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 & H.R. 13113*, 93d Cong., 2d Sess. 565 (testimony of B.H. Jones) (1974); Valdez, "Modernizing the Regulation of Commodity Futures Markets," 13 *Harv. J. Legis.* 35, 60 (1975); *Stucki* v. *American Options Corp.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,559 at 22,286 (CFTC No. R77-59, Feb. 13, 1978).

We underscore: The Court of Appeals majority and dissenting opinions contain no analysis whatsoever of the implications of this significant legislative history.

Additional aspects of the pertinent legislative history which were not adequately analyzed by the Second Circuit (and which would be briefed if the Petition were granted) include the 67th, 74th, and 90th Congresses' expressed intent in enacting sections 5(d), 5a(8), and 9(b); the significance of Representative Fino's bill [H.R. 9178, 90th Cong., 1st Sess. (1967)] in the formulation of the 1968 amendments to the Act; and the significance of Representative Smith's and Senator Hart's bills [H.R. 11195, 93d Cong., 1st Sess. (1973); S. 2837, 93d Cong., 1st Sess. (1973)] in the formulation of the 1974 amendments to the Act.[12]

Fully developed, the legislative history demonstrates that Congress has never expressed any intention whatsoever to create private causes of action under the Act against exchanges and their officials; that it has assiduously avoided creating such causes on several occasions, while enacting many other provisions of bills which would have done so; and that, while obviously borrowing from other statutes in important respects, it has *not* borrowed from related provisions in those statutes which expressly create private causes.[13]

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[12] While many provisions of the Fino, Smith, and Hart bills were incorporated in the 1968 and 1974 amending acts, provisions in them expressly creating private causes of action against exchanges were not incorporated.

[13] Thus important questions of constitutional law are raised in this case, since Article I of the Constitution vests legislative powers exclusively in Congress. And Congress has repeatedly refrained from providing *any* private cause of action against exchanges and their officials under *any* provision of the Commodity Exchange Act. See *Cannon*, 441 U.S. at 730 (Powell, J., dissenting). See also *Wilson* v. *First Houston Investment Corp.*, 556 F.2d 1235, 1243-45 (5th Cir. 1978) (Hill, J., dissenting), *vacated* (and remanded for further consideration in light of *Transamerica Mortgage*), 444 U.S. 959 (1979).

II.

AT ISSUE ARE SIGNIFICANT QUESTIONS OF PUBLIC POLICY WHICH DESERVE THIS COURT'S ANALYSIS.

A private cause of action "should not be implied if it would frustrate the underlying purpose of the legislative scheme." *Cannon*, 441 U.S. at 703. Such would be the result, however, if private causes of action are implied against exchanges and their officials under the Commodity Exchange Act.

a. The Scheme of the Act

Congress has designed the Commodity Exchange Act "to provide a *uniform* regulatory structure covering all futures trading . . . [and] to allow for the extension of the economic benefits of futures trading under this structure to those areas of commerce where the risk-shifting and price-discovery functions of futures markets might prove to be of value." [Sen. Rep. No. 95-850, 95th Cong., 2d Sess. 10 (1978) (emphasis added)].

So designed, the Act constitutes an elaborate regulatory scheme in which Congress has provided a "pervasive panopoly of judicial and administrative means for enforcing compliance with the Act,"[14] including civil fines, compensatory reparations, arbitration, cease and desist orders, injunctive and emergency orders, and criminal penalties.

But at the same time, Congress has expressly recognized and codified the critical, central role of the commodity exchanges. Under the Act, for example, the exchanges:

(1) Develop and design all futures contracts, and set the terms and conditions for such contracts (7 U.S.C. §§ 7, 7a).

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[14] *Leist*, Comm. Fut. L. Rep. (CCH) at 24,190 (Mansfield, J., dissenting).

(2) Provide the exclusive facility for trading these contracts (7 U.S.C. §§ 6, 6b, 6c, 6h).

(3) Establish standards for and control the admission to membership of persons by or through whom such contracts may lawfully be traded (7 U.S.C. § 12c).

(4) Enforce contract terms and trading requirements [7 U.S.C. § 7a(8)].

(5) Evaluate confidential market information obtained from the federal government [7 U.S.C. § 12a(6)].

(6) Provide administrative machinery designed to prevent market manipulation [7 U.S.C. § 7(d)].

(7) Conduct disciplinary proceedings (7 U.S.C. § 12c).

(8) Disseminate market information (7 U.S.C. § 6g).

(9) Arbitrate customer/broker disputes [7 U.S.C. § 7a(11)].

(10) Prescribe and enforce financial rules for futures commission merchants [7 U.S.C. §§ 6f(2), 7a(9)].

(11) Intervene in the markets in emergency situations [7 U.S.C. §§ 7a(12), 12a(9)].

In performing this critical, central role, the exchanges operate under *pervasive federal oversight*. The Commodity Futures Trading Commission is vested with jurisdiction, for example:

(a) To license an exchange as a "contract market" (a precondition to lawful operation), but only if the exchange meets many specific requirements (7 U.S.C. §§ 7, 7a).

(b) To receive for review and prior approval all exchange rules relating to contract terms and other trading requirements [7 U.S.C. § 7a(12)].

(c) To alter or supplement the rules of an exchange if deemed necessary or appropriate to protect producers, users, or consumers [7 U.S.C. § 12a(7)].

(d) To specify the periods within which deliveries of the underlying commodity may be made [7 U.S.C. § 7a(4)].

(e) To specify the grades of commodities deliverable and the locations where deliveries may occur [7 U.S.C. §§ 7a(b), 7a(10)].

(f) To specify the maximum amount of futures contracts that can lawfully be owned or traded by a person in a single day (7 U.S.C. § 6a).

(g) To review, affirm, reverse or modify a disciplinary or access denial action taken by an exchange (7 U.S.C. § 12c).

(h) To initiate a disciplinary or access denial proceeding if an exchange fails or refuses to do so (7 U.S.C. § 12c).

(i) To review, affirm, reverse or modify any other action taken or withheld by an exchange (7 U.S.C. § 12c).

(j) To inspect the books and records of the exchange, its board and committees [7 U.S.C. § 7a(2)].

(k) To conduct investigations into the operations of exchanges [7 U.S.C. § 12(a)].

(l) To declare a market emergency and direct an exchange to take corrective action [7 U.S.C. § 12a(9)].

(m) To seek injunctions (including mandamus) in the federal courts preventing or enjoining an exchange from violating the Act or the rules, regulations or orders thereunder (7 U.S.C. § 13a-1).

(n) To institute administrative actions against an exchange for violations, and to issue cease-and-desist orders in connection therewith (7 U.S.C. § 13a).

(o) To impose civil penalties up to $100,000 for each offense under the Act against an exchange or any of its directors, officers, agents or employees (7 U.S.C. § 13a).

(p) To cause criminal proceedings to be instituted against an exchange for violation of certain provisions of the Act, carrying fines of up to $500,000 and up to 5 years imprisonment [7 U.S.C. §§13a, 13(b), 13c].

(q) To suspend or revoke the designation of an exchange as a "contract market" for violations of the Act (7 U.S.C. § 7b)[15]

It is clear from the nature of the CFTC's oversight powers that self-regulation remains the first line of defense of the regulatory scheme. Self-regulation is, after all, a concept which "has been followed by the exchanges since their inception, *and continually encouraged by the Congress.*" [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 44 (1974) (emphasis added)].

b. The Need for Centralized, Uniform Regulation

A private remedy against commodity exchanges and their officials with respect to their self-regulatory activities is patently incompatible with the objectives of the regulatory system of the Commodity Exchange Act and, in fact, frustrates "the underlying purpose of the legislative scheme," *Cannon*, 441 U.S. at 703.

Self-regulation, as Congress has recognized, operates under a system of commodity exchange rules or bylaws "descriptive of 'ideal industry practice' " and the role of the exchanges is to "encourage their members to strive toward that ideal." [H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 45 (1974)]. For that reason, "nearly all [commodity] exchanges have nebulous rules prohibiting [for example] 'inequitable conduct' or 'unbusinesslike dealings.' " [*Id.*].

In this environment, the potential for mischief through private actions testing the sufficiency of self-regulatory efforts is manifest. Scores of different district courts will be called upon, not only to render their own interpretations of commodity

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[15] See also *Leist*, Comm. Fut. L. Rep. (CCH) at 24,194-95 (Mansfield, J., dissenting).

exchange rules, but also to decide the quantum of self-regulatory vigor to be expected of the exchanges. Over time, the exchanges will face a multitude of conflicting interpretations of both their rules and their duties, a result that this Court has warned against in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689-90 (1975).[16]

Such a result is diametrically opposed to the plan of centralized, *uniform* regulation embodied in the Commodity Exchange Act. Indeed, Congress has given the CFTC a rare grant of "exclusive jurisdiction" over the exchanges *vis-a-vis* other federal and state regulatory agencies (7 U.S.C. § 2), for the express purpose of assuring that "the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings." [120 *Cong. Rec.* 30459 (September 9, 1974) (remarks of Sen. Talmadge)].

At the same time, Congress has given the CFTC powers to review and change all pertinent exchange rules and to examine exchange self-regulatory activities. These powers are clearly

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[16] The Chicago Board of Trade, Citrus Associates of the New York Cotton Exchange, Inc., Commodity Exchange, Inc., and Coffee, Sugar & Cocoa Exchange, Inc. are currently defending suits seeking damages against them in excess of $1,112,600,000—in courts in New York City, Chicago, and Bexar County, Texas. (See note 3). Often, as in several of these pending suits, the focus is on emergency actions taken by the exchanges, pursuant to the Commodity Exchange Act, in response to market problems which have been detected. Plaintiffs sue because the exchange actions were not to their liking—because they allegedly interfered with their profits—or because the actions were insufficient *in their opinion*. The mere defense of these suits, of course, is a considerable drain on self-regulatory resources. And because of the highly leveraged nature of futures trading, as well as the large volume of transactions which by law must be conducted only on federally-designated commodity exchanges, the potential for damage claims against the exchanges is enormous—far greater, we submit, than that faced by stock exchanges. It should be underscored: Unlike securities, there is no over-the-counter market in futures. All futures trading must be conducted on the exchanges.

adequate to protect the public and, in addition, to promote the uniformity desired by the Act. Under this scheme, there simply is no need, or place, for private suits.[17]

c. The Public Nature of the Exchanges

The character of exchange "violations" of the Commodity Exchange Act differs substantively from the misconduct generally outlawed by the Act. To the extent that an exchange falls short of effective self-regulation in a specific instance, it inflicts no direct injury upon the public. Rather, the injury results from the actions of others which the exchange did not (and, more likely, *could not*) prevent.

To attach private liability to exchange self-regulation in this context exposes commodity exchanges to serious risks not borne by their counterparts in the commodity regulation community. More important, this risk of liability actually works to discourage the setting of high standards of conduct by exchanges, a fact expressly recognized by Congress. [See H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 46 (1974)].

Moreover, commodity exchanges cannot be both law enforcement agencies and the accused at the same time:

> —Exchanges must conduct their investigative efforts under the Act in a vigorous and conscientious manner

[17] Among these powers, for example, is the authority granted in section 6b of the Act (7 U.S.C. § 13a) to assess a civil penalty against an exchange for violating the Act or Commission rules or orders. In granting this authority to the Commission, however, Congress expressly mandated that, in determining the amount of penalty, the Commission must consider whether the amount will "materially impair" the exchange's "ability to carry on its operations and duties." Federal courts are not subject to the constraints of section 6b and could award damages that "materially impair," if not destroy, the ability of a commodity exchange to carry on its operations and duties. This is further evidence of how private suits against commodity exchanges can frustrate the legislative scheme.

without regard to whether the evidence accumulated by them might aid plaintiffs in suits against exchanges or weaken their own defense against damage claims.

—Exchanges must be prepared to act as impartial disciplinary tribunals under the Act and to reach objective decisions of guilt or innocence without the fear that their decisions might buttress a plaintiff's case against them or jeopardize their defense against damage claims.

—The confidentiality of exchanges' investigative work must be preserved, whereas those efforts may have to be disclosed prematurely to plaintiffs, or to co-defendants, either through normal civil discovery or as evidence of due diligence, to the potential jeopardy of the investigation's progress.

In short, the exchanges' law enforcement duties (mandated by Congress) cannot be reconciled with their status as defendants in matters that they have under active investigation. And private damage actions against exchanges for self-regulatory activities obviously contravene the strong public policy which underlies the immunity from private liability conferred on those who are charged with public enforcement duties under federal statutes, including the CFTC, with which the exchanges *share* enforcement responsibilities under the Commodity Exchange Act. The anomaly of different legal treatment of the exchanges and the CFTC under fundamentally identical circumstances, while performing essentially the same federally-mandated functions, is not only unwarranted; it is positively contrary to Congress' goal of quality public protection.

A parity of regulatory atmospheres is compelled by two factors. First, the exchanges, in performing self-regulatory activities mandated by the Commodity Exchange Act, engage in efforts that are functionally indistinguishable from the CFTC's own regulatory work and, if those self-regulatory

functions are to continue as the Act intends, they must be permitted to operate in a legal environment as sheltered from private damage liability as the courts have created for the federal regulatory agencies. Second, the exchanges' self-regulatory programs are so pervasively controlled by the CFTC as to content, procedures, and decisions that they are not "private" activities in any realistic sense.

To use the words of this Court, there exists here a "type of partnership between government and private enterprise," *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341, 366 (1963), designed "to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry," 373 U.S. at 371 (Stewart, J., dissenting). Clearly, self-regulation in the commodity industry constitutes *delegated governmental power:*

> *Under the practice of self-regulation, Governmental powers are delegated to the exchanges,* which undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in this complex and changing industry. [H.R. Rep. No. 93-963, 93d Cong., 2d Sess. 9 (1974) (emphasis added)].

In the performance of their self-regulatory activities, mandated by the Commodity Exchange Act and controlled at every stage by the CFTC, the exchanges reasonably should be entitled to the same protections from private damage suits that the government enjoys. The reasons for this protection are as compelling when applied to the exchanges as in the case of the CFTC. In addition to being able to perform their law-enforcement responsibilities in a vigorous and conscientious manner, without fear of the consequences:

> —Exchanges must be free to set strict and comprehensive standards of conduct for their members, even though a higher "failure rate" of compliance can be

expected, without fear that their less-than-perfect regulatory record will expose them to massive private damage liability.

—Exchanges must be free to criticize themselves, their own staff, their procedures and the quality of their efforts, and thus to effect necessary improvements, without fear that self-criticism will condemn them in private damage suits.

—Exchanges must be able to enlist the services of dedicated and talented members and staffs to administer their self-regulatory programs, without exposing them to the unacceptable risks of personal liability to private parties.

—Exchanges must be free to devote their limited resources to self-regulation as mandated by the Commodity Exchange Act, *not* to the costly defense of private damage actions.

CONCLUSION

Sound public policy clearly argues against implying private causes of actions against commodity exchanges and their officials. Such a result should be reached only if there is "persuasive evidence" that this was Congress' intent. *Transamerica Mortgage,* 444 U.S. at 20. Such evidence is patently lacking. To the contrary, Congress, when confronted directly with the question, has expressly recognized the exchanges' unique role in the scheme of the Commodity Exchange Act. Exchanges are expressly insulated from reparations suits and state *parens patriae* actions, the only private causes of action expressly provided for in the Act. Furthermore, the amount of civil penalties which may be assessed against exchanges by the CFTC is expressly limited so as not to impinge upon their important operations and federally-mandated self-regulatory programs. (7 U.S.C. §§ 13a, 13a-2, 18).

For the foregoing reasons, the EXCHANGES, as *amici curiae*, respectfully request that the petition of the New York Mercantile Exchange be granted.

Respectfully submitted,

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